91-618

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

Daniel P. SHEEHAN, Esq.
Petitioner,

versus

John HULL, Richard Secord, Albert Hakim, Thomas Clines, Adolfo Calero, Robert Owen, John Singlaub, Theodore Shackley, Rafael "Chi Chi" Quintero, Ronald Joseph Martin, Sr., Mario Delamico, James McCoy, Moises Nunez, and Jorge Gonzalez,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI OF DANIEL P. SHEEHAN, ESQ.

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QUESTIONS PRESENTED

#1

Is a plaintiff's attorney deprived of his Fifth and Sixth Amendment rights not to be deprived of his property without due process of law when a district court imposes upon him a Rule 11 sanction of over $1 million based upon a finding that the attorney filed and prosecuted a civil complaint which had "no evidence," when this finding is made by the district court directly in the face of substantial evidence to support the claims, but the district court considered said evidence to be nonexistent unless it was submitted before trial in an affidavit or deposition form or in some other form that was court admissible.

#2

Is a plaintiff's attorney deprived of his Fifth Amendment right not to be deprived of his property without due process of law when a district court imposes upon him a fine of over $1 million pursuant to the "bad faith" exception to the American Rule, based upon a finding that the attorney filed an affidavit containing false representations when this finding is based solely upon the conflicting affidavits of the defendants, with no hearing being accorded to the plaintiff's attorney at which (1) to evaluate the comparative credibility of the affidavits submitted, (2) to undertake the cross-examination of conflicting witnesses, or (3) to evaluate the alleged bad faith motive of plaintiff's attorney.

#3

Is a plaintiff's attorney deprived of his Fifth Amendment right not to be deprived of his property without due process of law when a district court imposes upon him a fine of over $1 million, equal to virtually all of the defendants' costs and attorney's fees, pursuant to Title 28 U.S.C. §1927 on a finding of fact that the attorney "vexatiously multiplied litigation" when the district court made no finding of the proportion of the defendants' costs or attorney's fees that were caused by this unspecified multiplication of litigation cited by the court in its finding.

#4

Did the district court abuse its discretion when it imposed a penalty of over $1 million against the plaintiffs' attorney pursuant to Rule 11, Title 28 U.S.C. §1927 and the bad faith exception to the American Rule on the record of evidence supporting the plaintiff's complaint found in the record below.

PARTIES

Tony Avirgan and Martha Honey were plaintiffs-appellants in the court of appeals. Daniel P. Sheehan (plaintiffs' counsel) and the Christic Institute (the law firm of plaintiffs' counsel), were non-party-appellants in the court of appeals. Daniel P. Sheehan is the Petitioner herein. Avirgan and Honey and the Christic Institute have submitted separate Petitions. Appellees in the court of appeals were those listed as defendants-appellees in the caption of the case sought to be reviewed (reprinted in the appendix to this Petition at App.I, p. 1A-2A.

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OPINIONS IN THE CASE

The June 23, 1988 decision (on the merits) of the United States District Court for the Southern District of Florida is reported at 691 F. Supp. 1357 and is reprinted in the appendix at App.I, p. 24A-30A. The February 2, 1989 order of the United States District Court for the Southern District of Florida is reported at 705 F. Supp 1544 and the clarification of that order is reported at 125 F.R.D. 189; these orders are reprinted in the appendix at App I, p. 31A-48A; and App.I 49A-52A, respectively.

The June 18, 1991 decision of the United States Court of Appeals for the Eleventh Circuit is reported at 932 F.2d 1572 and is reprinted in the appendix at App.I, p. 1A-23A. The September 9, 1991 order denying rehearing and rehearing in banc is not reported and appears in the appendix at App.I, p. 53A.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on June 18, 1991. App.I, p. 1A. On August 7, 1991, Justice Kennedy signed an order extending the time to file this petition for a writ of certiorari to and including October 15, 1991. The order denying petitioner's (petition for rehearing and) suggestion of rehearing en banc was entered on September 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

The Fifth Amendment to the United States Constitution provides;

> No person shall be held to answer for a capital,

> or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides;

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Federal Rule of Civil Procedure involved herein is Rule 11, which provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.... The signature of any attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after

reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. §1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE FACTS

On May 29, 1986, Case No. 86-1146-CIV-JLK was filed in the United States District Court for the Southern District of Florida. This multi-count civil complaint charged Major General Richard Secord and twenty-nine other men with being members of a federal criminal racketeering "enterprise," prohibited by the Federal Racketeer Influenced and Corrupt Organization Act (hereafter RICO), 18 U.S.C. §1961 *et seq.* The RICO count charged that this enterprise was smuggling arms and explosives from the United States into Central

America to the Nicaraguan *contras*. This count also charged that members of this RICO enterprise had conspired to commit, and had actually caused to be committed, specific acts of murder, criminal assault, arson, kidnapping, and drug smuggling in support of the *contras* between 1983 and 1986.[1]

Plaintiff Tony Avirgan, a free-lance television cameraman working for ABC Evening News, charged in one assault count of this May 1986 complaint that he had been injured in his business property and person by a bomb detonated at an international press conference held by dissident *contra* leader Eden Pastora in La Penca, Nicaragua on May 30, 1984. Mr. Avirgan's co-plaintiff and wife, Martha Honey[2], in the second assault count, alleged that she had been threatened with murder after her investigation into the La Penca bombing uncovered evidence implicating John Hull and certain other defendants named in this lawsuit.[3]

Prior to filing this civil complaint, the plaintiffs' attorney, Daniel Sheehan, who is General Counsel for The Christic Institute of Washington, D.C., had conducted an extensive inquiry into the facts. This pre-filing information was set forth in a December 12, 1986 affidavit which was submitted

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[1]Many of these defendants were later shown by Congress and by the Independent Counsel Lawrence Walsh to have been operatives of Richard Secord's private covert operations "Enterprise."

[2] Martha Honey was a free-lance journalist working in Costa Rica for National Public Radio, the British Broadcasting Corporation, the Canadian Broadcasting Corporation, and the Sunday Times of London.

[3] This investigation was financed in part by the Newspaper Guild, and the Committee to Protect Journalists, and was submitted to the district court in opposition to the Rule 56 and Rule 11 motions filed by the defendants.

to the district court before any proceedings commenced in this case. This affidavit is included in the Petitioners' Joint Appendix at App.II, p. 391A.

This information included petitioner Sheehan's personal presence at the May 23, 1986 sworn testimony given by mercenary Jack Terrell to a Costa Rican Federal Court in which witness Terrell stated, under oath that: 1) he attended a January 1985 meeting at the Miami home of FDN *contra* leader Adolfo Calero at which defendants Calero, Hull, Owen, and Vidal conspired to carry out a second assassination effort against Eden Pastora; 2) during the course of this meeting, defendant Vidal stated, in the presence and within the hearing of defendants Hull, Calero and Owen - and in furtherance of the criminal objective of persuading witness Terrell to undertake the second assassination effort against Eden Pastora: "We put a bomb under him [Eden Pastora] but it did not work because of bad timing"; 3) at this January 1985 meeting, Terrell agreed to carry out this assassination objective; and 4) defendant Vidal physically pointed out to Terrell at this January 1985 meeting, a man sitting on the veranda of defendant Calero's home whom defendant Vidal identified as a man named Amac Galil [Terrell later identified, in a sworn statement given to the Costa Rican Judicial Police, a photograph of the La Penca bomber as this same man].

Petitioner Sheehan's pre-filing information also included plaintiff Honey's interview of one Alberto Guevara in which interview Guevara stated to Honey the following: 1) Guevara, on or about May 8, 1984, saw defendant Hull accompany the man publicly identified by the Costa Rican federal police as the "Per Anker Hansen," who had placed and detonated the La Penca bomb, to a northern Costa Rican Rural Guard station at which defendant Hull assisted "Hansen" in securing a boat and an outboard motor and then witnessed "Hansen" and Hull set off in the direction of La Penca; and 2) Guevara, on May 30, 1984, again saw this

same "Per Anker Hansen" at the Hotel Irazu in San Jose, Costa Rica among the journalists that were gathering to attend the press conference at La Penca.

This pre-filing information also included petitioner Sheehan's personal interview of Carlos Rojas Chinchilla in which witness Rojas stated: 1) that in July 1985, Rojas met David X who confessed, in an effort to persuade Rojas to aid him in his effort to escape from Costa Rica without being arrested for the La Penca bombing, that he was a co-conspirator in the enterprise operating from John Hull's ranch in Costa Rica, and that he knew that the group which had planned and executed the La Penca bombing included defendants Hull, Calero, Posey, Vidal, Galil (aka "Hansen") and Corvo; 2) that David X told Rojas that he had witnessed a pre-May 30, 1984 meeting between defendant Hull and "Hansen" in Ciudad Quesada, Costa Rica, where he saw Hull pay "Hansen" $50,000 as a partial payment to assassinate Eden Pastora; 3) that witness Rojas had audio tape-recorded some of the inculpatory conversations with David X (a copy of which he gave Sheehan through the plaintiffs, and a transcript of which Sheehan provided to the defendants and to the district court during discovery and pre-trial proceedings); 4) that in August 1985, witness Rojas and David X were physically beaten by three men employed by John Hull, and that these men then kidnapped both Rojas and David X and forcibly took them to a place that Rojas later identified to be John Hull's farm where, in Rojas' presence, these men stated that they were going to contact "Mr. Hull" to tell him that they had captured "the squealers."

Prior to filing the complaint, petitioner Sheehan also had reviewed all of plaintiff Honey's professional interviews and conclusions of her investigation which were published in her book, La Penca; Report of an Investigation (hereafter, La Penca Report). See App.II at 66A. Copies of these interviews, and of the La Penca Report, were submitted to the defendants and to the district court during discovery and

pre-trial proceedings, and in opposition to the defendants' motions for sanctions. The La Penca Report set forth the detailed data on the basis of which Honey, Avirgan and Sheehan had formed their good faith belief that defendants Hull, Vidal, and other defendants named in the May 29, 1986 complaint had personally planned and carried out the May 30, 1984 La Penca bombing.

This pre-filing information also included an interview of Marcos Aguado, who was at the time the head of Pastora's air force, who stated that he had attended a pre-May 30, 1984 meeting in Costa Rica in which defendant Hull and Juan Jose Saborio had agreed that "a quick way had to be found to get rid of" Eden Pastora. Plaintiffs submitted a sworn affidavit of Aguado's testimony to the district court in opposition to defendants' motions for summary judgment.

With regard to attorney Sheehan's charges set forth in the May 1986 complaint that certain defendants had committed this bombing as a predicate act of an on-going criminal racketeering enterprise -- thus generating the derivative civil RICO liability of the co-members of the enterprise -- attorney Sheehan demonstrated to the district court that he possessed the following information before filing: 1) The detailed interviews of retired U.S. Army Chief Warrant Officer Eugene Wheaton (later submitted to the court in a full sworn deposition) describing Wheaton's knowledge of this "enterprise" from his personal participation in it, and from his first-hand discussions with defendant Hull's criminal co-conspirators, and; 2) The interviews of enterprise associate Edwin P. Wilson (later submitted to the court in the form of a lengthy sworn affidavit) directly incriminating certain defendants in the long-lived criminal assassination program described in the May 1986 complaint.

The Costa Rican government indicted defendants Hull and Vidal for the first degree murder of the persons killed in the La Penca bombing, and has now demanded Hull's extradition from the United States to stand trial. Defendants

Hull and Vidal were charged by the Costa Rican government with having committed this crime as members of the very network described in petitioner's May 1986 complaint.

Despite this compelling pre-filing evidence, the plaintiffs' federal civil complaint was aggressively attacked through specific pleadings in the district court by defendant Secord and his co-defendants as a malicious "fabrication" by the plaintiffs and their counsel. In fact, the defendants formally charged before the district court that the plaintiffs and their counsel were prosecuting, in "bad faith," a set of false criminal charges without the support of any adequate pre-filing investigation.[4]

After eight months of opposing Rule 12(b)(6) and Rule 8 motions to dismiss for lack of specificity, the plaintiffs commenced discovery on their October 3, 1986 Amended Complaint on February 24, 1987 immediately after Judge King ordered the defendants to answer the complaint. The plaintiffs filed numerous interrogatories and requests for documents, as well as demands for depositions.

On July 27, 1987, following four months of unbroken defiance by the defendants of the numerous requests for discovery issued by plaintiffs' counsel, Judge King held a hearing on the plaintiffs' Motion to Compel Discovery. At this hearing, counsel for defendant Secord demanded that Judge King require the plaintiffs, as a precondition to the defendants' cooperation with any discovery, to reveal to the court evidence proving that each defendant named in the complaint had personally participated in planning or executing the specific May 30, 1984 assault that injured plaintiff Avirgan. Judge King, in his July 30, 1987 Order Setting Discovery Limitations, rejected this demand of the

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[4] The defendants contended that the December 12, 1986 Affidavit (App.II at 391A) filed by attorney Sheehan contained further "bad faith" false statements in support of these false charges.

defendants.

Instead, he ordered the plaintiffs to use the "first phase" of their discovery to prove the following three elements of their case before conducting any further discovery: A) that the specific federal criminal racketeering "enterprise" alleged by the plaintiffs and their counsel in the RICO count of their complaint in fact existed; B) that this enterprise was functioning in Costa Rica between 1983 and 1986; and C) that each of the defendants named in the complaint was an active and willing member of this RICO Enterprise between 1983 and 1986, the time period when the La Penca bombing was planned and committed.

Between July 30, 1987 and March 31, 1988 the plaintiffs and their counsel conducted this restricted discovery and, on March 31, 1988, presented to the court a sworn Declaration of Counsel which revealed substantial evidence proving these three elements. This declaration is included in the Petitioners' Joint Appendix at App.II 89A-390A. The existence of the evidence to prove these facts and the general nature of this evidence were both demonstrated to the district court in this Declaration of Counsel.[5] App.II, p. 89A-390A.

However, when confronted by this evidence on March 31, 1988, Judge King adamantly refused to lift the geographical, time-frame and subject matter limitations he had previously only temporarily imposed upon the plaintiffs' discovery in July. Furthermore, Judge King also refused to postpone the trial date so as to allow the plaintiffs any reasonable time to perform the additional discovery previously promised after their proof of the first three elements of their case. This

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[5] In over 1000 footnotes, this Declaration revealed the existence and nature of evidence in the "court admissible" form of affidavits and sworn depositions. Other pieces of this evidence needed further "perfecting" only as to form, to be made admissible at trial.

refusal, in the face of the plaintiffs' showing of evidence, left the plaintiffs and their counsel a mere 6 weeks of remaining discovery time to convert into admissible form their considerable circumstantial and direct evidence which supported the conclusion that defendant Hull, acting as an agent for the defendants' criminal enterprise, hired defendant Galil (aka "Per Anker Hansen") to commit the May 30, 1984 La Penca bombing and that defendant Galil did, in fact, commit this bombing which injured plaintiff Avirgan.[6]

After the May 15, 1988 close of discovery, thirteen defendants moved for summary judgment. These Rule 56 motions were supported by nothing more than the self-serving affidavit of each defendant setting forth his unsupported conclusory assertion of his "lack of responsibility," either direct or indirect, for the plaintiffs' injuries, and a further conclusory assertion that the plaintiffs had "no evidence" linking either Galil or Hull to the bombing or linking Hull to Galil. In response to the defendants'

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[6] During this short 6-week period: 1) Defendant Hull was subpoenaed for deposition, but refused to participate in any deposition convened in Costa Rica (claiming that the plaintiffs' attorneys could not "practice law" in Costa Rica without a license), or in the U.S. At a pre-trial hearing four days before the discovery cut-off date, Judge King set a new date for Hull's pre-trial deposition in the U.S., but refused to grant plaintiffs' motion to compel Hull's attendance; 2) Judge King refused to accept for filing in opposition to the defendants' motions for summary judgement a sworn affidavit of Edwin P. Wilson directly incriminating several of the named defendants as active members of the enterprise described in the complaint. Instead, Judge King required that witness Wilson's testimony would be acceptable in the form of a sworn deposition. However, when the plaintiffs noticed witness Wilson for this deposition, the defendants refused to participate and successfully moved to quash the notice of deposition.

unsupported motions for summary judgment, the plaintiffs presented to the district court substantial evidence on the issue of causation.

Furthermore, on May 17, 1988, at a pre-trial attorneys' conference, plaintiffs' counsel presented the defendants with a pre-trial stipulation including both a list of witnesses and exhibits which the plaintiffs intended to call at trial. This pre-trial stipulation was filed with the district court and was discussed at the pre-trial conference with Judge King on May 27, 1988. In this stipulation, the plaintiffs notified the court and opposing counsel of the existence of 58 witnesses who plaintiffs planned to call to testify as to: (a) the causation of the assault at La Penca, (b) the identity of the La Penca bomber and his direct connection to the enterprise, (c) the details of the night of the assault at La Penca, or (d) to lay the foundation for the presentation of evidence on the causation of the La Penca bombing assault by defendants.[7] Plaintiffs also notified the defendants and the court of the existence of 49 specific exhibits which would be presented at trial in support of the testimony of these 58 witnesses.

Moreover, the evidence filed by the plaintiffs with the district court in opposition to the defendants' unsupported motions for summary judgment included the following ten witnesses' testimony, all of whom were named by plaintiffs as potential trial witnesses:

--the depositions of Eden Pastora and Carol Prado, which demonstrated that defendants Hull, Vidal, and Corbo worked together to divide Pastora's *contra* forces; that supplies to Pastora were cut-off in the Spring of 1984 by Oliver North as a warning; that Pastora received a 30-day ultimatum from

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[7] All of these witnesses, and the nature of their testimony, had been previously described to the defendants and to the district court through compliance with defendants' discovery demands, in depositions, or was revealed in other pre-trial filings.

the Central Intelligence Agency to join the FDN *contras* based out of Honduras by June 1, 1984 or suffer the consequences; and that the La Penca bomber, posing as "Per Anker Hansen," was on the San Juan river visiting Pastora's bases (including La Penca) 22 days before the bombing at La Penca;

--the affidavit of Jesus Garcia, wherein he stated that he overheard a group of Cubans, in the presence of a man whom Garcia identified as "Amac," claim direct responsibility for the La Penca bombing;

--the deposition of Carlos Rojas Chinchilla, in which Rojas recounts the confessions of enterprise co-conspirator David X made directly to him connecting the enterprise to the assault at La Penca (see *supra* p. 6);

--the 3 June, 1988 sworn affidavit of Martha Honey, in which she verifies the presence of Galil in Honduras through car rental records, which she had in her possession, in March, 1984, which evidence lent direct support to David X's story;

--the testimony of Jack Terrell at the 1986 criminal libel trial brought by John Hull against Honey and Avirgan (see *supra* p. 5);

--the deposition of Hull associate William Crone, who testified that on the night of the bombing, Hull called Crone up and told him specifically not to participate in the evacuation of victims;

--the affidavit of Marcos Aguado (see *supra* p. 7);

--the sworn deposition of Costa Rican Attorney General Fernando Cruz Castro, the Chief Prosecutor who had overseen the OIJ (Judicial Investigations Organization, equivalent to the F.B.I.) investigation of the La Penca bombing, and who testified as to the findings of the official investigation including, but not limited to, the following: a) that the bomber posed as journalist "Per Anker Hansen;" b) that "Hansen" registered at the Gran Via Hotel in San Jose, Costa Rica in early May, 1984; c) that "Hansen" carried a

bomb constructed of C-4 explosives to the bombing site in a metal suitcase with the word "CANON" printed across it; d) that "Hansen" detonated the bomb by radio frequency via two-way walkie talkie; and e) that "Hansen" left the country the morning after the bombing took place;

--the sworn deposition of plaintiff Tony Avirgan, taken by the defendants, in which Avirgan testified as to his direct knowledge about the La Penca bombing, including, but not limited to "Hansen's" presence at the press conference, with the metal case [containing the bomb] at his side; and

--the sworn deposition of Alberto Guevara. (see *supra*, p. 5).

When confronted with this exposition of evidence, Judge King entered an Order of Summary Judgment against the plaintiffs. *Avirgan v. Hull*, 691 F.Supp 1357 (S.D. Fla. 1988); App.I. p. 24A-30A. The district court summarily ruled that because the plaintiffs had revealed their assault evidence to the court in a form that was not "court admissible," that this evidence could not be considered in the Rule 56 proceeding. *Id.* The court did not allow plaintiffs an opportunity to perfect their evidence.

After entering the Order of Summary Judgment against the plaintiffs, the district court, thereupon, concluded summarily that certain other conclusory assertions made by the defendants were true. The defendants filed self-serving affidavits in support of their Rule 11, §1927 and bad faith motions for sanctions to the effect that petitioner had lied in his filings. On the basis of this second finding, made directly in the face of petitioner's charge-by-charge refutation of these assertions[8] and without any hearing whatsoever being accorded to plaintiff's counsel -Judge King imposed over $1

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[8] The affidavit of Daniel P. Sheehan filed in Opposition to the defendants' motions for sanctions is included in the Petitioners' Joint Appendix at App.II 55A-88A.

million in fines against the plaintiffs' attorney, and against his law firm pursuant to Rule 11, §1927, and the "bad faith" exception to the American Rule. *Avirgan v. Hull*, 125 F.R.D. 189 (S.D. Fla. 1989); App.I, p. 49A-52A.

A supersedeas bond, supported by a letter of credit was posted by the Christic Institute in March of 1989. On March 8, 1989, a Stay of Judgment on the Order of Sanctions was issued by the district court. On May 25, 1989, plaintiffs filed a Notice of Appeal from the district court's three sanctions orders of February 2, February 24 and April 27, 1989. The appeals from the Rule 56 Summary Judgment, the Rule 11, the §1927, and the "bad faith" orders of sanctions were consolidated on March 22, 1989. Oral argument was held before a panel of the Eleventh Circuit on February 25, 1991. The panel issued its opinion affirming, *in toto*, the district court's rulings on summary judgment and sanctions on June 18, 1991. *Avirgan v. Hull*, 932 F.2d 1572 (1991); App.I at 1A.

After sustaining all of Judge King's rulings, the panel adopted the finding in the district court's clarification order that the plaintiffs and their attorney appeared also to have violated their "continuing obligation" to voluntarily dismiss the complaint after it became clear that they could not prevail in the case. App.I at 51. However, the panel neither stated at which specific point in the proceedings this obligation arose, nor undertook any effort to precise the portion of attorneys' fees that defendants subsequently accrued so as to justify the damages.

REASONS FOR GRANTING THE PETITION

I. THE OPINION OF THE PANEL UPHOLDING THE RULE 11 ORDER OF SANCTIONS IMPOSED AGAINST PETITIONER CONFLICTS DIRECTLY WITH THE SUPREME COURT OPINIONS IN *CELOTEX v. CATRETT*, 477 U.S. 317 (1986) AND *ANDERSON v. LIBERTY LOBBY*, 477 U.S. 242 (1986)

It is true, as both the district court and the Eleventh Circuit panel in *Avirgan* observed, that:

> In practically every motion for summary judgment, the appellees asserted that they had no involvement, directly or indirectly, in the La Penca bombing, that they were not the cause of any of the injuries, and that they were not and had never been members of an illegal enterprise.

Avirgan, et al., v. Hull, et al., 932 F.2d 1572 (11th Cir. June 18, 1991); App.I at 15A.

In addition, defendant Owen asserted in his affidavit filed in support of his Rule 56 motion - with no reference whatsoever either to the plaintiffs' evidence or to the record – that the plaintiffs possessed "no evidence" tending to support their conclusion that defendant Hull hired defendant Galil to commit the La Penca bombing or that Galil did, in fact, commit the bombing.

However, both the district court, and the panel ignored the mandate of this Court that:

> it is not enough to move for summary judgment . . . with a conclusory assertion that the plaintiff has no evidence to prove his case . . . without supporting the motion in any way.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 LEd.2d 265 (1986)(White, J., concurring)(emphasis added).

The nature of the "support" required to be supplied by a movant for summary judgment, over and above his simply "informing" the court of his conclusory assertion, before his Rule 56 motion can be considered by a district court, was set forth in *Celotex* by Justice Rehnquist and Justices Marshall, Powell and O'Connor as follows:

> Of course, a party seeking summary judgment always bears the initial responsibility of [1] informing the district court of the basis for its motion and [2] identifying those portions of the 'pleadings', depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (enumeration inserted and emphasis added).

It is self-evident that a movant cannot identify as "support" for his conclusory assertion simply that he was not in any way responsible for the plaintiffs' injuries. The movant is required to refer the district court to positive portions of the pleadings, depositions, interrogatories or some specific affidavits which concretely "negate" the plaintiffs' available evidence on this issue, or which "demonstrate the absence of" any positive pieces of evidence possessed by the plaintiffs which tend to support the plaintiff's factual contention. Simply "conclusorily asserting" that the defendant is not responsible for the assault against the plaintiff, in no way "negates" the affirmative contrary evidence of plaintiffs' witnesses which the record shows the plaintiffs and their counsel possessed. The defendants, however, made no effort whatsoever before the district court to "support" the "conclusory assertions" made in their

affidavits.

Despite the fact that the district court was presented with an extensive list of witnesses whom the plaintiffs represented to the court could provide evidence tending to support these conclusions of fact, despite the fact that this evidence was described to the court, and despite the fact that this evidence was both positive and admissible in its nature, the district court simply summarily entered an Order of Summary Judgment against the plaintiffs' complaint. The district court entered this order on the sole ground that the opposition filed by the plaintiffs had not tendered evidence in court-admissible form. *Avirgan v. Hull*, 691 F.Supp. 1357 (S.D. Fla. 1988); App.I, p. 24A.

The district court chose simply to believe the defendants' Rule 56 unsupported conclusory assertions made in their affidavits and granted their summary judgment motions. By upholding this action by the district court, the Eleventh Circuit panel effectively authorized "trial on affidavit" - directly contrary to the dictate of this Court set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

> [Our holding] by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson, 477 U.S. at 255.

Most importantly, the district court and the panel ignored the mandate of this Court set forth in *Celotex* in which Justice White, in his controlling concurring opinion, requires

that a district court summarily reject a Rule 56 motion if it is supported by nothing more than a self-serving affidavit conclusorily asserting that the plaintiff has "no evidence" to support his claim without any supporting discussion of the existent evidence in the record.

> I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion [for summary judgment] with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a concusory assertion that the plaintiff has no evidence to prove his case.
>
> A plaintiff need not initiate any discovery, or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit. . . . [I]f respondent has named a witness to support her claim, summary judgment should not be granted without [the movant] somehow showing that the named witness' possible testimony raises no genuine issue of fact.

Celotex, 477 U.S. at 328 (White, J., concurring)(emphasis added).

In support of their assault charge, the plaintiffs herein revealed the names of their witnesses and informed the district court of the nature of the evidence that each such witness possessed. The district court condemned this response as inadequate to defeat the defendants' conclusory assertion of "no evidence," on the sole ground that plaintiffs had not submitted their causation evidence to the district court in a court-admissible form, such as by affidavit or deposition or by certified documents. *Avirgan v. Hull*, 691 F.Supp 1357; App.I, p. 24A.

Petitioner maintains that this Court's ruling in *Celotex* is directly controlling herein because it provides that it "is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." To defeat a summary judgment motion asserting only that the plaintiff has failed to produce any evidence to support his case, the respondent need only reveal the names of his witnesses and the nature of their evidence in order to effectively counter such conclusory assertions of the movant. The plaintiff and his attorney do not also need to depose their witnesses or obtain their affidavits. The petitioner maintains that, in light of this Court's express rulings in *Celotex*, such revealed evidence cannot be entirely disregarded by the district court merely because this evidence is not tendered in a court-admissible form.

To enter a Rule 56 order against a plaintiff on the record of such a set of filings, i.e. to deny his right to a jury trial on his claim based solely upon the provision to him of these procedures, deprives such a plaintiff of his Seventh Amendment right to a trial by jury on his civil claim without due process of law.

Moreover, and directly at issue in this Petition is the fact that when a plaintiff's attorney is sanctioned by the same district court under Rule 11 for allegedly filing and prosecuting a civil complaint with "no evidence" to support

this complaint - and this finding of "no evidence" is based directly upon the district court's "no evidence" finding made in favor of the defendants' Rule 56 motion arrived at through the above described proceeding - then the attorney himself has standing to object to the use of this constitutionally-flawed procedure.

Petitioner was deprived of over $1 million of his personal property predicated upon a Rule 11 finding that he had "no evidence" to support his filing of the complaint. The finding was based directly upon the same constitutionally-flawed procedure used to entirely disregard the plaintiffs' evidence in the Rule 56 proceeding. This procedure also violates petitioner's Fifth and Sixth Amendment rights not to be deprived of $1 million of his property without due process of law.

A finding of "no evidence" cannot be predicated solely upon a conclusory assertion made in an affidavit filed by an adversarial defendant asserting that plaintiff's counsel had "no evidence" to support his claim, when that conclusory assertion has been explicitly belied by revelation to the court of 58 named witnesses and 49 specific exhibits which constitute witnesses and evidence supporting the charges in the complaint. Unless and until the defendant "negates" this evidence, the civil attorney is constitutionally entitled to his presumption of innocence of the charge that he had "no evidence" to support his complaint.

II. THE BAD FAITH SANCTIONS AGAINST PETITIONER VIOLATED HIS DUE PROCESS RIGHTS

Sanctions, whether imposed under Rule 11, 28 U.S.C. §1927, or the "bad faith" exception to the American Rule, entail the exercise of considerable discretion on the part of a district court. Because of the potential for abuse inherent in discretionary determinations, the safeguards of due process are particularly important. "The purpose of this requirement

is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . ." *Fuentes v. Shevin*, 407 U.S. 79, 80-81 (1972). Furthermore, when, as here, the sanction is severe and based upon subjective determinations, due process safeguards assume an even more critical role in the administration of justice.

The issue of due process in the imposition of sanctions of this magnitude bears consideration by this Court. Awards of attorney's fees pursuant to the various sanctioning mechanisms are increasingly encountered in federal litigation. Two of this Court's recent decisions involved sanctions of the magnitude encountered here. *Chambers v. NASCO, Inc.*, __ U.S. __, 111 S.Ct. 2123 (1991); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. __ (1991). Because of the enormous discretionary sanctioning power vested in judges - and the consequent potential for abuse - it is imperative that due process protections be accorded. This Court has not heretofore addressed the question of how much process is due to a respondent on a sanctions motion. An authoritative pronouncement by this Court of the contours of that due process is necessary.

A. The Assessment of a Sanction in Excess of $1 Million Must Comport with the Due Process Clause of the Fifth Amendment

The Fifth Amendment to the U.S. Constitution mandates that no person shall be deprived of property without due process of law. Indeed, the requirements of due process apply to deprivations of property worth far less than is at stake in this case. See, e.g., *Fuentes*, 407 U.S. at 90 (assortment of household goods, of disputed ownership, held property protected by due process clause). Of course, depending upon the importance of the interest involved, due process tolerates variances in its form. *Fuentes*, 407 U.S. at

83. Petitioner was admittedly afforded an opportunity to submit written oppositions to the defendants' motions for sanctions. But given the severity and clearly punitive nature of the sanction award at bar petitioner should have been afforded extensive due process safeguards: "The more serious the possible sanction . . . the more process that will be due." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987)(in banc).

1. Due Process and Rule 56 Mandate that Findings of Bad Faith or Improper Purpose May Not Be Made Solely On The Basis of Affidavits

The crux of the district court's entire million dollar sanction was its wholly conclusory finding of "bad faith" on the part of petitioner. Such an enormous sanction imposed pursuant to the bad faith exception to the American Rule is not unprecedented. See *Chambers, 111 S. Ct. 2123 (1991).* However, as this Court admonished in *Chambers*: "[a] court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 111 S. Ct. at 2136 (citation omitted). Furthermore, the ruling in *Roadway Express v. Piper*, 447 U.S. 752 (1980) mandated a hearing prior to imposition of a "bad faith" sanction; "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.*, at 767 (emphasis added); see also *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1395 (7th Cir. 1983)("court erred in imposing fees [for willful abuse of the judicial process] without the prior hearing required by *Roadway Express*").

Due to the conclusory nature of the district court's ruling, one is left to guess the basis of the bad faith sanction. The court implies that petitioner misrepresented facts in his December 12, 1986 Affidavit: "[s]everal of the disclosed

witnesses [identified by number in the affidavit] later state under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit." App.I at 19A-20A. Solely on the basis of speculative inferences from sharply conflicting affidavits supplied by the opposing parties, the judge concluded that petitioner had lied and was consequently liable for the enormous bad faith sanction.

But due process does not permit a finding of bad faith to be made - with credibility determinations, inferences of motive and factual findings - on no basis other than cold affidavits. This Court has expressed serious reservations about such a "trial by affidavit" in the context of a Rule 56 proceeding. See *Anderson*, 477 U.S. at 255 ("Our holding . . . by no means authorizes trial on affidavits.").

By analogy, attorneys in a "bad faith" or Rule 11 proceeding in which sanctions may not only subject them to large financial loss but seriously damage their professional reputation, should have due process protections against "summary judgment" commensurate with those provided to ordinary litigants. Rule 56 may very well have to be molded to apply to sanction proceedings, but its fundamental postulate that summary judgment is not available when there are contested issues of fact is just as applicable to sanction proceedings as to underlying proceedings.

Proceedings under Rule 11 are also subject to constitutional requirements of due process. As stated in the case of *Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987): "[c]ourts should be sensitive to the impact of sanctions on attorneys. They can be economically punishing, as well as professionally harmful: due process must be afforded." 803 F.2d at 1280. A hearing, however, is not always required in a Rule 11 determination. Fed. R. Civ. Proc. 11 advisory committee note. Nevertheless, in this case, both the severity of the sanction and the subjective elements upon which it was based rendered an

oral hearing imperative.

In his initial sanction order the judge stated that plaintiffs' attorney "must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint." Implicit in this charge is the view that petitioner filed the suit for some unstated "improper purpose." Later, in his clarification order, the district court appeared to confirm the bad faith element of petitioner's Rule 11 sanction: "many of the reasons for the bad faith award center around or relate back to signed pleadings that violated Fed. R. Civ. P. 11."

Because these issues of improper purpose, bad faith and credibility are subjective and therefore ambiguous, an evidentiary hearing was warranted: "when a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater. *Donaldson*, 819 F.2d at 1561.

No precedent holds that a court may rule on a lawyer's motivation in filing a complaint without hearing testimony, permitting cross-examination and determining credibility when confronted with conflicting affidavits as to the facts. Given the severity and subjectivity of the sanction, the district court should have afforded petitioner a full hearing, complete with confrontation privileges and an opportunity to present argument and supporting evidence.[9]

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[9] The district court's intention to punish petitioner is evident. Accordingly, the punitive sanction of over one million dollars which threatens to bankrupt petitioner is tantamount to a criminal penalty and arguably implicates the due process requirements attendant to criminal contempt proceedings, including a jury trial. "[S]uch sanctions can assume the criminal character of a fine as, for instance, when their amount is grossly

2. The Findings of the District Court and the Panel Were Conclusory and Insufficient as a Matter of Law.

The paucity of the district court's findings makes it impossible to discern whether the court properly exercised its discretion in fashioning a sanction. Particularly in light of the enormity of the sanction, the court should have enunciated the specific findings upon which it based its order. *Roadway*, 447 U.S. at 767; *Rothenberg v. Security Management Co., Inc.*, 736 F.2d 1470 (11th Cir. 1984). Neither the district court nor the panel's opinion contain any clear delineation of the conduct being sanctioned, the factual findings regarding each act, or the application of a particular sanction authority to the sanctioned acts. The factual findings, such as they are, are "mere conclusory statements." *Rothenberg*, 736 F.2d at 1472 ("In a case, such as this one, which has dragged on for more than six years and produced a voluminous record of thousands of pages, such bald assertions provide no meaningful basis for this court to review the ultimate finding of 'bad faith'.").

As indicated above, petitioner's purported "bad faith" was the basis of the entire sanction. However, a bad faith finding is a subjective determination requiring a finding of actual knowledge or scienter. See *White v. General Motors Corp., Inc.*, 908 F.2d 675, 685 (10th Cir. 1990)(". . . the

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disproportionate to the attorney's misconduct. Additional due process safeguards are necessary under those circumstances. Those additional safeguards should parallel the procedures provided for in Rule 42(b)" *Donaldson*, 819 F. 2d at 1563 (Johnson, J., specially concurring). But even if the district court believed a jury trial was not warranted, petitioner was, at a minimum, entitled to an evidentiary hearing where they could present oral testimony to "contest and explain" the sanction contemplated against him. *Id.* at 1563.

sanctioning of a party requires specific findings that the party was aware of the wrongdoing."); *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1089 (2nd Cir. 1977)(finding of bad faith requires personal awareness or responsibility for sanctioned activity). The district court implied that petitioner had committed perjury: "[s]everal of the disclosed witnesses . . . flatly denied the statements he had attributed to them in his affidavit." However in order to hold him liable, the court had to find that the alleged untrue statements were intentional. *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417 (11th Cir. 1989)(upholding district court finding that, though party submitted a false affidavit, Rule 11 sanctions not appropriate because court could not determine whether untrue statements were intentional). The court made no such finding, nor could it since there is simply no evidence on the record that could support such a charge.

III. PETITIONER DID NOT VEXATIOUSLY MULTIPLY THE PROCEEDINGS TO WARRANT A SANCTION PURSUANT TO 28 U.S.C. §1927

The district court purported to find a third ground for sanctions in 28 U.S.C. § 1927, which provides that: "Any attorney . . . admitted to conduct cases in any court . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred . . . ." The power to assess sanctions under this provision "is a power which the courts should exercise only in instances of a serious and studied disregard for the orderly processes of justice." *Kiefel v. Las vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir.), *cert. denied*, 395 U.S. 908, *reh'g. denied* 395 U.S. 987 (1969). It cannot be said that petitioner Sheehan's conduct has exhibited such disregard for all of the reasons set forth above.

Again, because of the district court's lack of identifiable

findings, petitioner is left to speculate as to the nature of his "crimes." Surely, the mere volume of docket entries in a case against 29 individuals who are actively litigating every discovery issue, without the court's consideration of the necessity or reasonableness of these aspects of the litigation, cannot be used to support this sanction. This is so because Section 1927 does not authorize awarding of the full costs of a case, but rather only those specific excess costs caused by the specific conduct found to be vexatious. *United States v. Associated Convalescent Enterprises. Inc.*, 766 F.2d 1342, 1347 (9th Cir. 1985). The district court's order wholly fails to specify which "excess" costs can be attributed to which alleged "multiplication" of the proceedings and an award of costs for defendants, offensive discovery attack cannot be sustained thereunder. If the district court meant to sanction the appeal of the disclosure order, for instance, its complete failure to parse out any fees associated therewith requires a vacating of the entire award.[10]

By choosing a "broad brush" approach and awarding each defendant his full bill for the entire case under § 1927, the order of the district court is completely at odds with the express statutory provision on which it allegedly is based. When a court imposes sanctions under 28 U.S.C. §1927, or

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[10]If the §1927 sanction was imposed on the basis of petitioner's litigation of his clients' right to protect from discovery by the defendants in a civil RICO case the identities and location of certain witnesses then such a ruling was clear error. This litigation position was directly supported by an *amicus curiae* brief filed by the congressional author of the RICO statute. Furthermore, petitioner offered to turn over the information to the district court *in camera*. Petitioner had also presented to the court evidence that specific witnesses, previously revealed to the defendants, had been harassed and physically threatened. Finally, a magistrate ruled that petitioner's conduct had been undertaken in good faith.

under any other authority, it must sufficiently express the basis for the sanctions imposed in order to identify the excess costs reasonably incurred by the party to whom they will be due. If a trial court imposes sanctions, specific findings are required. There must be an express basis for the imposition of sanctions and an identification of the costs resulting therefrom. Because the person sanctioned is entitled to notice and an opportunity to be heard, the objectionable conduct must be identified sufficiently to make that opportunity meaningful. The reason for the decision must be in a form reviewable by the appellate courts. *Braley v. Campbell*, 832 F.2d 1504, 1513 (lOth Cir. 1987)(*en banc*). Not one of these criteria was met by the district court's order.

IV. IT WAS AN ABUSE OF DISCRETION FOR THE COURT TO BOOTSTRAP IT'S SUMMARY JUDGMENT ORDER INTO AN ORDER FOR SANCTIONS

After unilaterally declaring the plaintiffs' evidence to be non-existent due to the failure of counsel to submit it to the court prior to trial in a court admissible form (as discussed in Argument I above), the district court, thereupon, simply "disappeared" all of the plaintiffs' positive evidence from the record of this case.

Petitioner protests the unjust procedure by means of which the district court "transmuted" actual named witnesses - who had evidence tending to support the plaintiffs' factual allegations - first into witnesses who had no technically "admissible" evidence against the defendants, then into witnesses who had "no evidence whatsoever" against any of the defendants, then into witnesses who never had any such evidence, and finally, into witnesses who never existed at all - and then, on the basis of this final finding, summarily imposed upon plaintiffs' counsel a punitive sanction of over $1 million not only for allegedly filing a lawsuit that simply

failed to "make admissible" the positive evidence which he possessed to justify the filing of his original complaint, but also for allegedly filing a bad faith lawsuit which had no hope whatsoever of producing any evidence to support the complaint through the discovery process.[11]

This procedure represents not just a simple "bootstrapping" of a standard Rule 56 order of summary judgment into an unjustified Rule 11 sanction, as was expressly condemned in *O'Neal v. Dekalb County, Ga.* 850 F.2d 653, 658 (11th Cir. 1988), but indeed, represents a "double-bootstrapping" of a standard Rule 56 order of summary judgment first into an unjustified Rule 11 sanction and then into an unconscionable "bad faith" sanction equal to virtually all of the defendants' costs and attorneys' fees from the very inception of the litigation.

But even assuming the legitimacy of the summary judgment order, the sanction imposed against the petitioner was wholly unwarranted. The district court's opinion granting the summary judgment gave no hint that the court considered the case "frivolous" or deserving of sanctions. Indeed, the opinion was a lengthy, though not exhaustive, analysis of the plaintiffs' evidence which the court refused to consider because it was not in court admissible form. After setting forth its perception of the evidence necessary to establish causation, the court expends over six pages

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[11] This procedure is rendered even more Kafkaesque by the fact that all of these allegedly "knowingly untrue" accusations have been explicitly confirmed by independent governmental investigations in both Costa Rica and the United Stated - resulting in the first degree murder indictment of defendants John Hull and Felipe Vidal (see New York Times, March 1, 1990 "International"; and Washington Post, March 1, 1990, p. A15), the naming of defendant "Per Anker Hansen" as the La Penca bomber "to a certainty," and the indictment of John Hull's RICO enterprise partners by Independent Counsel Walsh.

describing some of the evidence put forth by the plaintiffs. *Avirgan*, 691 F.Supp. at 1371-1377. App.I at 24.29A-25A The opinion acknowledges that the evidence "may establish" certain critical "issues of fact." *Id.*, at 1375.

It is impossible to reconcile this opinion which at least acknowledged the presence on the record of substantial circumstantial evidence supporting plaintiffs' allegations with the court's sanction order (issued over seven months later) finding the case entirely frivolous. Indeed, the court's contentions regarding the "unsubstantiated" and "speculative" nature of plaintiffs' evidence blatantly contradict its earlier Order Granting Summary Judgment.

CONCLUSION

For the foregoing reasons, the petition of Daniel P. Sheehan should be granted.

Respectfully submitted,

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